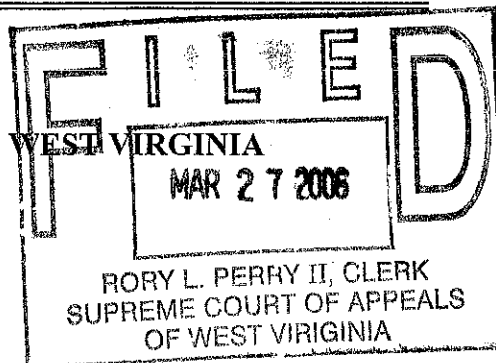


NO. 32896

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

*Appellee,*

v.

DAMIEN RICKETTS,

*Appellant.*

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**BRIEF OF APPELLEE STATE OF WEST VIRGINIA**

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*Appellant.*

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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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I.

STATEMENT OF THE CASE

This is an appeal by Damien Ricketts (“Appellant”) from his jury conviction of misdemeanor battery in the Circuit Court of Monongalia County, the Honorable Judge Russell M. Clawges, Jr. presiding.

II.

STATEMENT OF FACTS

A. **FACTUAL HISTORY.**

In the early morning hours of December 10, 2004, Appellant hit Amanda Sondag in the face with his fist, at least once, as he confessed on the witness stand, during a fight he had with her.<sup>1</sup>

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<sup>1</sup>See Trial Transcript (“Tr.”) 232-33 for Appellant’s confession; *see also* Trial Tr. 57 for the victim’s account.

But the story begins before that. Appellant had two girls living with him in Morgantown, West Virginia: Appellant's girlfriend, Natosha Hawkins, and her friend, Amanda Sunday. Earlier that night, the two girlfriends had gone out – drinking, perhaps – while Appellant did not.<sup>2</sup> He was studying for final exams.<sup>3</sup>

After they all got home, Amanda changed out of her clothes and into her pajamas: a white tank top and maroon gym shorts.<sup>4</sup> They were all still talking at this point with her and Natosha sitting on the floor at the bottom of the stairs, and Appellant sitting a few stairs up. Then, an argument erupted – the circumstances surrounding the argument are really unimportant – because the escalation that arose out of the circumstances; that is, the violence, the *hitting* is inexcusable.

Before the *hitting*, came the *yelling*. First Amanda, and then everyone.<sup>5</sup> Amanda got up and went up the stairs to go past Appellant, but on her way, she pushed his head against the wall.<sup>6</sup> Appellant then pushed Amanda back, and she fell down the last two stairs, landed on top of Natosha, and hit the door at the bottom of the stairs.<sup>7</sup>

That's when Appellant leapt to his feet while Amanda lay on the ground, and started hitting her.<sup>8</sup> Amanda curled up into a ball with her arms protecting her head and face; she could not recount

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<sup>2</sup>Trial Tr. 55.

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>Trial Tr. 55-56.

<sup>6</sup>Trial Tr. 56.

<sup>7</sup>*Id.*

<sup>8</sup>Trial Tr. 56-57.

exactly how many times her assailant hit her because it all happened so fast.<sup>9</sup> Amanda could not even remember exactly what was happening, except there was a lot of screaming. Even Natosha was screaming at Appellant to stop, but admittedly she could not do much of anything because of her small stature – even though she did make an attempt, which was to no avail because she is so small, especially in proportion to Appellant.<sup>10</sup>

Evidently, Appellant did not stop until there was blood.<sup>11</sup>

After the fight, Appellant also admitted that he “yelled for her to get out.”<sup>12</sup> Amanda was still dressed in her “pajamas,” a white tank top and a pair of maroon gym shorts.<sup>13</sup> It was the *early* morning of December 10, 2004, at about 4:00 or 5:00 in the morning.<sup>14</sup> While Amanda was outside in shock, her neighbors (Tristen and George) took her inside their apartment, calmed her down and cleaned her up a bit, and then took her to the emergency room (“E.R.”).<sup>15</sup> Appellant did none of these things. Again, he did nothing other than telling her to get out.

From the beating Amanda received at the hands of Appellant, the treating physician stated Amanda suffered not only from a scalp laceration and bruising on her cheek, but also a jaw

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<sup>9</sup>Trial Tr. 56-58.

<sup>10</sup>Trial Tr. 58-59.

<sup>11</sup>Trial Tr. 59.

<sup>12</sup>Trial Tr. 234.

<sup>13</sup>Trial Tr. 59.

<sup>14</sup>Trial Tr. 60.

<sup>15</sup>Trial Tr. 60-61.

fracture.<sup>16</sup> Amanda was also crying in the E.R. so vehemently that the attending physician made a note of it – something she never <sup>did</sup> does, because people who visit the E.R. are frequently quite emotional.<sup>17</sup>

Finally, because Amanda told the attending she had been beaten by someone she lived with, the physician referred her to the Rape and Domestic Violence Center.<sup>18</sup> That was when the police first became involved.

## **B. PROCEDURAL HISTORY.**

In December 2004, the Grand Jury for Monongalia County, West Virginia, returned an indictment charging Appellant with *Malicious Assault*, in violation of W. Va. Code § 61-2-9(a).<sup>19</sup> At the conclusion of his two-day trial on April 27, 2005, the jury found him guilty of the lesser-included offense of misdemeanor battery.<sup>20</sup>

At Appellant's sentencing hearing, the circuit court entertained and ultimately denied his motion for judgment of acquittal (or in the alternative, motion for a new trial).<sup>21</sup> The court then reviewed Appellant's pre-sentence investigation report, the victim's impact statement and addendum, multiple letters from various individuals on behalf of Appellant, and letters written by

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<sup>16</sup>Trial Tr. 157-58.

<sup>17</sup>Trial Tr. 157.

<sup>18</sup>Trial Tr. 161-62.

<sup>19</sup>R. 1.

<sup>20</sup>Trial Tr. 325.

<sup>21</sup>Sentencing Tr. 2-9; R. 165.

Appellant to the victim.<sup>22</sup> All of these aforementioned documents were ordered filed as part of the record.<sup>23</sup> The circuit court also heard Appellant's allocution, the victim's verbal statement (made by telephone), and arguments by counsel from both sides, before reaching its sentencing decision.<sup>24</sup> With all of these documents and testimony before it, the circuit court sentenced Appellant to a term of 12 months in the North Central Regional Jail, his sentence to run consecutive to the sentence imposed in Case No. 04-F-146.<sup>25</sup>

It is from this conviction and sentence that Appellant brings his appeal.

### III.

#### ASSIGNMENTS OF ERROR

Appellant assigns the following grounds as error:

- A. The Circuit Court Erred When it Allowed the State to Question the Petitioner Regarding His Prior Criminal History.
- B. The State Failed to Show Beyond a Reasonable Doubt That the Petitioner Did Not Act in Self Defense and Thus Resulted in the Jury Returning a Compromised Verdict.
- C. The Circuit Court Erred When it Failed to Dismiss the Indictment Against the Petitioner When it Was Shown That the Officer Who Testified Before the Grad Jury Stated That the Defendant Refused to Provide a Statement after His Arrest.

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<sup>22</sup>R. 165-66.

<sup>23</sup>*Id.*

<sup>24</sup>*Id.*

<sup>25</sup>*Id.*

#### IV.

#### ARGUMENT

A. ANY REFERENCE TO APPELLANT'S PRIOR CONVICTION WAS HARMLESS, BECAUSE THE CIRCUIT COURT STRUCK THE EVIDENCE FROM THE RECORD AND CORRECTLY INSTRUCTED THE JURY TO DISREGARD IT; FURTHERMORE, ITS MENTION HAD NO PREJUDICIAL EFFECT ON THE JURY, BECAUSE IT CONVICTED HIM OF A MUCH LESSER OFFENSE.

1. The Standard of Review.

Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.<sup>26</sup>

2. Discussion.

Appellant asserts the circuit court committed reversible error when it permitted the prosecution, over objection by defense, to question Appellant regarding a prior conviction for delivery of a controlled substance. However, any error that may have occurred in this regard was rendered harmless because Appellant confessed to hitting the victim on the stand; he was able to speak to the matter at issue in closing argument; and the circuit court ultimately struck the evidence from the record, instructing the jury to disregard it and not consider it for any purpose.

Because 404(b) evidence is known to be so volatile and easily abused, Justice Cleckley wrote the admissibility procedures regarding such evidence over ten years ago, in *State v. McGinnis*.<sup>27</sup>

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<sup>26</sup>Syl. Pt. 2, *State v. Adkins*, 163 W.Va. 502, 261 S.E.2d 55 (1980).

<sup>27</sup>193 W.Va. 147, 455 S.E.2d 516 (1994).

When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction.<sup>28</sup>

Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence.<sup>29</sup>

The prosecutor made it abundantly clear in pre-trial filings that she intended to use Appellant's prior convictions and additional "bad acts" information pursuant to the West Virginia Rules of Evidence 404(b) in her attempt to convict Appellant. In fact, prior to trial she stated as such in the "State's Disclosure of Information"<sup>30</sup> and in her "Notice of Intent to Introduce 404(b)

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<sup>28</sup>Syl. Pt. 1, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

<sup>29</sup>Syl. Pt. 2, *Id.*

<sup>30</sup>R. 49-52.

Evidence.”<sup>31</sup> The prosecutor’s stated reasons for desiring to introduce such evidence was “for purposes of establishing [Appellant’s] intent, and motive[.]”<sup>32</sup> In response, and also prior to trial, Appellant filed a motion in opposition.<sup>33</sup> At the pre-trial motion hearing, the circuit court ruled as follows regarding Appellant’s prior conviction of delivery of a controlled substance.

With respect to No. 4, that’s not going to come in in any event as 404(b) evidence. Certainly, if the defendant should choose to testify, I think Rule 60-something covers that, and as long as it fits within that rule, it’s useful for impeachment.<sup>34</sup>

Appellant took the stand in his own defense, and the prosecutor (believing he had “opened the door” or somehow crossed-the-line, as it were)<sup>35</sup> began the following line of questioning during cross-examination.

Q. You’ve been convicted of a felony offense, haven’t you?

[DEFENSE COUNSEL]: Your Honor, I object.

THE COURT: It’s overruled.

A. Yes, ma’am.

Q. You were convicted of trafficking in controlled substances, weren’t you?

A. No, ma’am.

Q. Distributing control substances?

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<sup>31</sup>R. 53-55.

<sup>32</sup>R. 53.

<sup>33</sup>R. 96-99.

<sup>34</sup>Trial Tr. 35.

<sup>35</sup>See Sentencing Tr. 6-7.

A. I don't believe the wording was possession or – it might've been distribution. You might be right, ma'am. You would know better than I would.

Q. Would it help for you to see the document?

A. You would know better than I would, ma'am.

Q. So, you were selling drugs, correct?

A. Not exactly, ma'am. I smoked marijuana.

Q. So, you're saying you weren't convicted of –

A. I didn't say I wasn't convicted, ma'am. What I said is that I wasn't exactly selling drugs, ma'am.

Q. And your conviction was for delivery of a controlled substance?

A. Yes, ma'am.

Q. That wasn't possession of a controlled substance, was it?

A. No, ma'am.

Q. That means you were transmitting it to somebody else?

A. Yes, ma'am.

[PROSECUTOR]: I have no further questions.<sup>36</sup>

Then during closing argument, it appears as though Appellant attempted to mitigate any damages he may have perceived, since the circuit court seemingly ruled inapposite during trial to its pre-trial ruling.

[Appellant] made a mistake five years ago with some marijuana. He's paid for that mistake and he continued with his school. He told you he was in school and

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<sup>36</sup>Trial Tr. 246-47.

close to graduating. That's not a part of this case and has no relevance to this case whatsoever.<sup>37</sup>

And, because Appellant reemphasized his prior conviction in closing, the prosecutor brought up his conviction once more in her rebuttal.<sup>38</sup>

[Appellant] wants you to believe he's a good guy. [Appellant] wants you to believe that it was a mistake with marijuana five years ago. It wasn't five years ago. But that's not in evidence, so I can't tell you when it was, neither is the fact that it was five years ago. You didn't hear how long ago that was, and you didn't hear that it involved marijuana, so you don't need to believe that it did. What you heard is [Appellant] tried to say, well, it was a little possession, and I had to offer to show him the conviction for him to admit that it was for drug trafficking. How honest do you think he's being with you here today.<sup>39</sup>

Almost directly thereafter, the circuit court *sua sponte* reversed its earlier trial ruling, and it essentially re-adopted its pre-trial ruling.<sup>40</sup>

Ladies and gentlemen of the jury, I'm going to do something a bit unusual at this point in the trial. I am going to instruct you to disregard some of the evidence which you heard during the trial of this case, and I'm going to strike that evidence from the record at this point and tell you not to consider it for any purpose whatsoever in your deliberations in this case, and that is the evidence of [Appellant's] prior conviction.

The Court has reconsidered an earlier ruling. It's not admissible and is not to be considered by you for any purpose whatsoever in your deliberations in this case. You are to decide this case based upon all of the other evidence and all of the other evidence alone.<sup>41</sup>

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<sup>37</sup>Trial Tr. 313.

<sup>38</sup>See Sentencing Tr. 7.

<sup>39</sup>Trial Tr. 319-20.

<sup>40</sup>See Trial Tr. 35.

<sup>41</sup>Trial Tr. 320-21.

At the end of Appellant's trial and after less than an hour of deliberation, the jury convicted Appellant of misdemeanor battery, a much lesser-included offense from that with which he was originally charged (malicious assault).

At his sentencing hearing, after hearing argument from both parties concerning Appellant's motion for judgment of acquittal (or in the alternative, motion for a new trial), the court ruled as follows.

With respect to [Appellant's] motion for judgment of acquittal, certainly there was more than adequate evidence presented to support the Court's decision to give the case to the jury for the jury's determination. The jury considered the evidence and returned a verdict. That verdict was supported by the evidence. If they had returned a verdict for a more serious offense, it would've been supported by the evidence. The evidence was there. It was a jury question. The jury decided. Accordingly, the motion for judgment of acquittal is denied.

*With respect to the evidence of the prior conviction, that certainly is a matter of some concern for the Court, however the Court feels that the limited instruction that was given and the verdict that was returned was supported by the evidence and was not a factor. So, the Court denies the motion for judgment of acquittal; the Court denies the motion for a new trial.<sup>42</sup>*

Taking the entire trial into consideration as a whole, if any error was made, it was harmless. As the State has already pointed out, there are three reasons why any error made in this regard is such. First, Appellant confessed to hitting the victim, Amanda Sunday. The following is a portion of Appellant's direct examination.

Q. Did you get [the victim] off of you?

A. Yes, sir.

Q. Did you hit her?

A. Yes, sir.

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<sup>42</sup>Sentencing Tr. 7-8 (emphasis added).

Q. So, you're not here telling the jury that you didn't hit Amanda Sunday?

A. No, sir.<sup>43</sup>

Second, Appellant was able to speak to the matter in closing argument and mitigate any "damage" he may have perceived.<sup>44</sup> At no time did the prosecutor object, nor did the circuit court censor him. And although the prosecutor brought up Appellant's prior conviction once more in her rebuttal closing, Appellant did not object to what she was saying.<sup>45</sup> Furthermore, the prosecutor explained her reason for revisiting the issue at the sentencing hearing: it was because Appellant brought up his prior conviction that she felt the need to do so as well.<sup>46</sup>

Last and most importantly, the circuit court reversed its earlier trial court ruling at the end of closing arguments, instructing the jury to disregard any and all evidence of Appellant's prior conviction, and striking that evidence from the record.<sup>47</sup> Thus, the jury went into deliberations as if it never heard any evidence regarding Appellant's prior conviction for distribution of a controlled substance. "[J]uries are presumed to follow their instructions."<sup>48</sup> This premise must be held true, for if it were not, the entire judicial system as we know it would crumble.

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<sup>43</sup>Trial Tr. 232-33.

<sup>44</sup>See Trial Tr. 313.

<sup>45</sup>See Trial Tr. 319-20.

<sup>46</sup>See Sentencing Tr. 7.

<sup>47</sup>See Trial Tr. 320-21.

<sup>48</sup>*State v. Miller*, 197 W. Va. 588, 606 476 S.E.2d 535, 553 (1996) (quoting *Zafiro v. United States*, 506 U.S. 534, 540 (1993) (citation and internal quotation marks omitted)).

In the end, the jury found Appellant guilty of battery – a crime far less severe than malicious assault. From its verdict, it appears as though the jury did precisely what it was instructed to do and disregarded the evidence of Appellant’s prior conviction. Most probably what had the most effect upon it was Appellant’s own confession of hitting the victim, and that was what resulted in the jury’s verdict of guilty of misdemeanor battery.

Thus, for all of the reasons above and in the record, this Court should find that if the circuit court made any error in this case, it was harmless.

**B. NEITHER THE CIRCUIT COURT NOR THE PROSECUTOR COMMITTED ANY ERROR, AS THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY VERDICT.**

**1. The Standard of Review.**

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.<sup>49</sup>

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.<sup>50</sup>

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<sup>49</sup>Syl. Pt. 1, *State v. Guthrie*, 194 W. Va. 657, 663, 461 S.E.2d 163, 169 (1995).

<sup>50</sup>Syl. Pt. 3, *Id.*

2. Discussion.

Appellant claims “[t]he State failed to show beyond a reasonable doubt that the Appellant did not act in self defense and thus resulted in the jury returning a compromised jury verdict.”<sup>51</sup> Essentially, Appellant’s argument translates into one of sufficiency of the evidence, in which case he has quite a hurdle to leap – and fails to make.

More specifically, Appellant appears to primarily take issue with the jury’s verdict; that is, guilty of misdemeanor battery, rather than malicious assault, the charge on which he was originally indicted. But it is not the province of an appellate court to make credibility determinations, as Appellant would have the Court do here. “Credibility determinations are for a jury and not an appellate court.”<sup>52</sup> Whom the jury believed and what weight it gave which witness was solely within *its* province. This proposition is true, especially in light of the fact that the circuit court correctly instructed the jury regarding witnesses and their testimony in its charge.<sup>53</sup>

You are the sole judges of the credibility or believability of each witness and the weight to be given to his or her testimony. As used in this charge, credibility means the truthfulness or lack of truthfulness of a witness. The weight of the evidence means the extent to which you are, or are not, convinced by the evidence.

....

From these and all other conditions and circumstances appearing from the evidence, you may give to the testimony of the witness such credit and weight as you believe it is entitled to receive.<sup>54</sup>

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<sup>51</sup>Brief, p. 9.

<sup>52</sup>Syl. Pt. 3, in part, *Guthrie* at 663, 461 S.E.2d at 169.

<sup>53</sup>*See generally* Trial Tr. 271-73.

<sup>54</sup>*Id.* at 271 and 273.

The circuit court also instructed the jury on the correct standard for self-defense, and the burden upon the State to disprove self-defense beyond a reasonable doubt.<sup>55</sup>

Only three persons saw what really happened that fateful night, and all three accounts were told with varying degrees of differences on the witness stand. But certainly the most damning testimony of all to Appellant's case had to have been his own, wherein he *voluntarily* confessed to hitting the victim on direct examination.

Q. Did you get [the victim] off of you?

A. Yes, sir.

Q. Did you hit her?

A. Yes, sir.

Q. So, you're not here telling the jury that you didn't hit Amanda Sunday?

A. No, sir.<sup>56</sup>

It must be remembered, the standard of review is a rather difficult standard to meet, considering that all evidence, inferences, and credibility assessments are viewed in a light most favorable to the prosecution.<sup>57</sup>

Simply because the jury found Appellant guilty of battery, rather than malicious assault, does not mean they disbelieved the victim, as Appellant alleges; nor does it mean the jury returned a "compromised verdict." The jurors simply assessed the credibility and weight of the witnesses' testimony in a manner that resulted in a different conclusion than Appellant would have reached.

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<sup>55</sup>See Trial Tr. 285-86.

<sup>56</sup>Trial Tr. 232-33.

<sup>57</sup>See Syl. Pts. 1 and 3, *Guthrie*.

The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt.<sup>58</sup>

Furthermore, this Court need not even find that the jury below properly found the essential elements of battery proved beyond a reasonable doubt, because

the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.<sup>59</sup>

Thus, for all of the reasons above and in the record, this Court should find that neither the circuit court nor the prosecutor committed any error, as there was sufficient evidence to support the jury verdict.

**C. BECAUSE THE LAWS RELATING TO THE RIGHT AGAINST SELF-INCRIMINATION AS SET FORTH IN *BOYD*,<sup>60</sup> CONCERN ONLY THE TRIAL JURY AND NOT THE GRAND JURY, THE CIRCUIT COURT CORRECTLY DENIED APPELLANT'S MOTION TO DISMISS THE INDICTMENT.**

**1. The Standard of Review.**

"[This Court's] standard of review of a motion to dismiss an indictment is generally *de novo*."<sup>61</sup>

**2. Discussion.**

Lastly, Appellant complains that the circuit court committed reversible error when it failed to dismiss the indictment after he showed that the officer who testified before the grand jury

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<sup>58</sup>Syl. Pt. 3, in part, *Guthrie* at 663, 461 S.E.2d at 169.

<sup>59</sup>Syl. Pt. 1, in part, *Id.* (emphasis added).

<sup>60</sup>Syl. Pt. 1, *State v. Boyd*, 160 W. Va. 234, 234, 233 S.E.2d 710, 712 (1977).

<sup>61</sup>*State v. Davis*, 205 W. Va. 569, 578, 519 S.E.2d 852, 861 (1999).

answered a grand juror's question by stating that Appellant refused to give a statement.<sup>62</sup> Appellant claims this "infraction" violates his right to remain silent and his Due Process Rights under the West Virginia Constitution. He is incorrect.

The following is the relevant portion of the grand jury proceeding, after the prosecutor had examined the officer, and after he had been taking --and answering-- questions from the grand jurors.

JUROR: Did [Appellant] admit to giving, in a statement did he admit to doing this?

THE WITNESS: No. He refused to give a statement.

JUROR: What was this supposed to be about?

THE WITNESS: What's that?

JUROR: What was they fighting about?

THE WITNESS: She was wanting to move back home. She was wanting to leave. Her and Natosha both were going to leave and move back to where they were from. That's what started the fight.<sup>63</sup>

From a simple reading of the grand jury transcript, it does not appear as though the juror, or any of the jurors, were particularly interested in any one thing. And it certainly does not seem as if any of them were interested in Appellant's refusal to give a statement, as if that is even a viable issue -- that is, referring to Appellant's silence out of purview of the *trial jury*.

At the pre-trial motion hearing, Appellant presented the following argument. The transcript of the relevant portion is represented *in toto*.

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<sup>62</sup>See Brief, p. 11.

<sup>63</sup>Grand Jury Tr. 6.

[DEFENSE COUNSEL]: In addition, Your Honor, and I'm not going to try to do this by surprise, I haven't done a written motion, the State, pursuant to our motion hearing, provided me with a transcript of the grand jury transcript in this case. I believe something needs to be addressed in that, in that I believe that Officer Beavers set forth improper testimony upon a question by a member of the Grand Jury requesting whether my client gave a statement. Officer Beavers said, no, he refused to give a statement.

I understand Grand Jury testimony is – all the rules of evidence don't necessarily apply, you're allowed to give hearsay statements and things of that nature, however, I believe my client's procedural due processes, his right not to self-incriminate or his right to remain silent stays with him, even if – in Grand Jury proceedings, and given that this statement was clearly a statement by the officer, saying that my client refused to give a statement after his arrest, I think is prejudicial and renders the indictment invalid against him. I guess I'm moving for the indictment in this case to be dismissed.

THE COURT: [Madame Prosecutor]?

[THE PROSECUTOR]: Your Honor, the question was – the answer was in response to a question by the Grand Jury. The officer did not comment on his inability to speak or his desire to remain silent or suggest that that meant that he was guilty. He simply answered the question that, no, he did not give a statement.

THE COURT: Well, certainly, in the context of the trial of this matter no comment can be made with respect to the defendant's exercise of his right to remain silent. I'm not so sure that applies to Grand Jury proceedings, so the motion is denied.<sup>64</sup>

So Appellant contends that speaking of his pre-trial silence during the grand jury proceeding is the *same* as mentioning it before the trial jury, or the *same* as if the prosecutor had cross-examined Appellant regarding it before the trial jury.

Yet Appellant cites to no law in support of his theory.

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<sup>64</sup>Trial Tr. 40-41.

Instead, as authority for this proposition, Appellant primarily cites to *State v. Boyd*<sup>65</sup> and *State v. Walker*.<sup>66</sup> Neither case is on point. But they are relevant, in that they both show why Appellant's argument is fatally flawed.

Syllabus point 1 of both *Boyd* and *Walker, supra*, specifically state:

Under the Due Process Clause of the West Virginia Constitution, Article III, Section 10, and the presumption of innocence embodied therein, and Article III, Section 5, relating to the right against self-incrimination, it is reversible error for the prosecutor to cross-examine a defendant in regard to his pre-trial silence or to comment on the same to the jury.<sup>67</sup>

Of course the jury referred to in the syllabus point is the *trial* jury. This evidence is far too prejudicial to be placed into evidence before a *trial* jury. But the same is not true in a grand jury proceeding. Appellant's right against self-incrimination is not being protected; the rules of evidence do not apply; defendants do not even appear before them. Grand juries are simply a vehicle to determine whether enough evidence exists for the prosecution to indict. A jury – a *trial* jury – is instructed during a circuit court's charge not even to consider the indictment as evidence of guilt.

Thus, for all of the reasons above and in the record, this Court should find that the circuit court correctly ruled by denying Appellant's motion to dismiss the indictment.

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<sup>65</sup>160 W. Va. 234, 233 S.E.2d 710 (1977).

<sup>66</sup>207 W. Va. 415, 533 S.E.2d 48 (2000).

<sup>67</sup>Syl. Pt. 1, *Boyd* at 234, 233 S.E.2d at 712; *see also*, Syl. Pt. 1, *Walker* at 416, 533 S.E.2d at 49.

V.

CONCLUSION

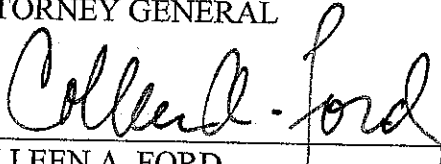
For all of the reasons set forth in this brief and apparent on the face of the record, this Court should affirm the judgment of the Circuit Court of Monongalia County.

Respectfully submitted,

State of West Virginia,  
*Appellee,*

By counsel

DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL

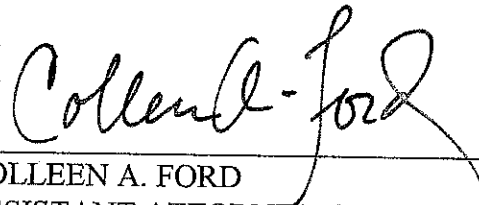
A handwritten signature in cursive script, reading "Colleen A. Ford", is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee State of West Virginia* was mailed to counsel for Appellant by depositing it in the United States mail, with first-class postage prepaid, on this 27 day of March, 2006, addressed as follows:

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